

**ORIGINAL**

**FILED**  
**JUL 17 1991**  
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No. 90-8466

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**IN THE**  
**SUPREME COURT OF THE UNITED STATES**  
**OCTOBER TERM, 1990**

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**DAVID E. RIGGINS,**  
**Petitioner,**

**v.**

**THE STATE OF NEVADA,**  
**Respondent.**

---

**BRIEF IN OPPOSITION TO**  
**PETITION FOR WRIT OF CERTIORARI**  
**TO THE SUPREME COURT OF THE STATE OF NEVADA**

**REX BELL**  
**District Attorney**  
**JAMES TUFTELAND\***  
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**Las Vegas, Nevada 89155**  
**Tel: (702) 455-4711**  
**Counsel for Respondent**  
**Attorney of Record\***

28 PR

QUESTION PRESENTED

Whether the denial of the Petitioner's motion to terminate his medication violated the Petitioner's constitutional right to a full and fair trial.

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#### STATEMENT OF THE CASE

The Petitioner was charged by way of an Information filed in the Eighth Judicial District Court, Clark County, Nevada, with one count of Robbery With Use of a Deadly Weapon and one count of Murder With Use of a Deadly Weapon. The Petitioner pled not guilty and not guilty by reason of insanity. Following a jury trial, the Petitioner was found guilty of both of the aforementioned crimes. On Count One, the Honorable James Brennan sentenced the Petitioner to serve fifteen (15) years on the Robbery charge and a consecutive fifteen (15) years on the Use of a Deadly Weapon enhancement. The jury sentenced the Petitioner to Death by lethal injection on the Murder With Use of a Deadly Weapon charge.

The Petitioner then appealed to the Nevada Supreme Court, raising six issues on appeal. The Nevada Supreme Court rejected his arguments and confirmed his convictions and sentences.

Petitioner now petitions this Court for a Writ of Certiorari.

#### STATEMENT OF FACTS

On November 20, 1987, Petitioner David Riggins rode with his roommate, Lowell Pendrey to the residence of Paul Wade in order to obtain a quantity of cocaine. While Pendrey remained in the vehicle, the Petitioner entered the residence and calmly emerged thirty (30) minutes later with a beer in his hand.

Shortly after Riggins left the apartment, Paul Wade's girlfriend, Patricia Bezian, called to make sure Wade was awake for work. She received a busy signal, so she continued to call every five minutes until 2:45 a.m. Because of the persistent busy signal, Miss Bezian became worried and called Mr. Wade's workplace. When she discovered that he had not reported for his shift, Miss Bezian immediately left her work at a local supermarket and returned to Wade's home at approximately 3:00 a.m.

Upon entering the residence, she encountered a horrifying scene. Paul Wade lay dead on the floor. Blood covered his ransacked bedroom, a bloody sheet hung in front of the window and the telephone had been torn out of the wall. After unsuccessful attempts to revive the victim, Miss Bezian frantically fled the apartment and used a neighbor's phone to call the police.



Wade had sustained thirty-two (32) direct stab wounds to the head, trunk and limbs. None of the thirty-two (32) wounds inflicted by the Petitioner was fatal; rather, the cause of death was most likely bleeding from all the wounds. Further, a triangular piece of steel was discovered embedded in the back of Paul Wade's skull. This piece of metal was later determined to be the tip of a knife that was subsequently seized from the Petitioner's bedroom.

On November 22, 1987, the Petitioner was arrested by the Las Vegas Metropolitan Police Department. He was charged and ultimately convicted of First Degree Murder and Robbery, both With the Use of a Deadly Weapon.

While incarcerated in the Clark County Jail following his arrest, the Petitioner was examined by Dr. Edward Quass, a psychiatrist for the Las Vegas Medical Center. Though Dr. Quass felt that Riggins was rational and coherent, the Petitioner claimed that he was hearing voices and had been for some time. Following a thorough examination, Dr. Quass prescribed Mellaril, an antipsychotic medication, primarily because the Defendant stated that he had used this prescription in the past with favorable results. Initially, the dosage was 100 milligrams (mg) per day, but it was increased to 800 mg at the time of the trial. Dr. Quass noted that

though this amount of Mellaril might make another patient groggy, it apparently did not affect the Petitioner in this manner. Finally, Dr. Quass stated that the Petitioner's appearance in court was not noticeably different from his unmedicated condition.

On January 24, 1988, the district court appointed Dr. Frank Master and Dr. Jack Jurasky to determine the competency of the Petitioner to stand trial. Initially, Dr. Master examined the Petitioner who stated that he was currently taking 450 mg of Mellaril per day and indicated that he had been using this medication for approximately six (6) years. Dr. Master also noted that the 800 mg dosage administered to the Petitioner at trial could have been a result of his increased tolerance to the medication because of extended use of Mellaril and additional drug abuse. The doctor indicated that if the Petitioner was taken off Mellaril, he might become psychotic and require several months of medication to return to a competent state. Finally, Dr. Master testified that if the Petitioner remained on this medication he would be competent.

Dr. Jack Jurasky also examined the Petitioner for competency. The doctor felt that the Petitioner was actively psychotic and if taken off the Mellaril, he would most

likely regress to manifest psychosis and become extremely difficult to handle. Further, he noted that, although the medication enhanced the Petitioner's ability to take part in court proceedings, nevertheless, the Petitioner was still not competent to assist counsel at trial. He also was of the view that Petitioner did not comprehend right from wrong at the time of the crime.

Dr. O'Gorman originally examined the Petitioner in September of 1982. This examination revealed a considerable degree of nervous trouble due mainly to excessive use of hallucinogenic drugs. Dr. O'Gorman thus prescribed 40 mg of Mellaril per day to reduce anxiety.

In March of 1988, subsequent to a court order, Dr. O'Gorman examined the Petitioner to determine his competency to stand trial. The Petitioner did not demonstrate any gross psychotic reactions and appeared knowledgeable regarding the events that lead to his incarceration. Though medicated with large doses of Mellaril, Dr. O'Gorman felt that there would be no effect on the Petitioner's ability to assist and communicate with his counsel at trial.

Dr. O'Gorman noted that because of his long drug history, the Petitioner would be more tolerant to medications and thus require higher dosages. Finally, Dr. O'Gorman doubted

the veracity of the Petitioner's claims of hearing voices and attributed his noticeable disorganization to longtime chemical abuse. Ultimately, Dr. O'Gorman indicated that the Petitioner was cognizant of the difference between right and wrong when the murder took place.

#### SUMMARY OF THE ARGUMENT

The ruling of the Nevada Supreme Court does not conflict with established Nevada case law regarding the medication of a defendant at trial. In Ybarra, infra, the Court noted that competency may be attained through the use of medication.

The Petitioner has also failed to carry his burden of showing that the Nevada Supreme Court's decision is in conflict with the federal courts or any other state courts of last resort. Most of the cases cited by Petitioner are factually inapposite. Further, Petitioner's extensive reliance on United States v. Charters, 829 F.2d 479 (4th Cir. 1987), is completely inappropriate, inasmuch as this case was reversed in a rehearing en banc which Petitioner failed to note.

REASONS FOR DENYING THE WRIT

The Petitioner has failed to meet his burden of showing that this Court should exercise its supervisory jurisdiction because of a conflict between the decision of the Nevada Supreme Court and this Court or any United States Court of Appeals or any state court of last resort. Nor has the Petitioner presented any question of federal law that this Court should address. See Rules of the Supreme Court, Rule 10.1.

The State has shown that the Nevada Supreme Court's decision properly applied the law as proscribed by this Court and followed by other state courts of last resort. For these reasons, this Court should decline to exercise its discretionary jurisdiction in this case.

A R G U M E N T

THE DISTRICT COURT'S DENIAL OF THE PETITIONER'S  
MOTION TO TERMINATE HIS MEDICATION DID NOT  
VIOLATE HIS CONSTITUTIONAL RIGHT TO A  
FULL AND FAIR HEARING

Petitioner alleges that his right to a fair trial was violated by the trial court's denial of his motion to terminate the administration of medication. In Nevada, the grant or denial of a motion is within the sound discretion of the trial court and will not be disturbed on review absent a clear showing of abuse of discretion. Sparks v. State, 604 P.2d 802 (Nev. 1980). Although the Petitioner has the right to a fair trial, this right is not absolute. Illinois v. Allen, 397 U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).

The Nevada Supreme Court recently addressed a similar issue as that raised herein in Ybarra v. State, 731 P.2d 353 (Nev. 1987), cert. denied, 470 U.S. 1009, 105 S.Ct. 1372, 84 L.Ed.2d 390 (1985). There, the defendant argued that he did not receive a fair trial due to the medication that he was under at the time of the trial. Id. at 356-357. Relying



on State v. Murphy, 355 P.2d 323 (Wash. 1960), Ybarra argued that a criminal defendant who is tried while medicated or sedated is denied due process. The Nevada Supreme Court rejected this argument, noting:

However, the majority of courts that have considered the issue have held that competency may be attained through the use of medication. See, e.g., State v. JoJola, 553 P.2d 1296, 1299-1300 (N.M. Ct. App. 1976); State v. Buie, 254 S.E.2d 26, 28 (N.C. 1979), cert. denied, 444 U.S. 971 (1979); Ake v. State, 663 P.2d 1, 6-7 (Okla. Crim. App. 1983), rev'd on other grounds, Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Law, 244 S.E.2d 302, 305-308 (S.C. 1978); State v. Stacy, 556 S.W.2d 552, 557-559 (Tenn. Crim. App. 1977); State v. Hayes, 389 A.2d 1379 (N.H. 1978).

State v. JoJola, 553 P.2d 1296 (N.M. Ct. App. 1976), is particularly instructive to the case at bar. In that case, the defendant's condition was diagnosed as schizophrenia of the paranoid type and he was given an antipsychotic medication, Thorazine. The medication was continued through trial and the appellate court rejected the defendant's contention that he had "an absolute right to be tried free from the influence of Thorazine." 553 P.2d at 1299.

Petitioner's reliance on Murphy, supra, is misplaced. In Murphy, the drugs at issue were tranquilizers rather than antipsychotics. In addition, these drugs were given to the

defendant by a fellow prisoner to treat the defendant's severe cold and not because the defendant was psychotic. Further, the Washington Supreme Court stated:

We do not intend to suggest that a new trial be granted in every criminal case -- or even in every capital case -- where the appearance of the accused before the jury is marred by some mental, physical or emotional impairment . . . Each case of this type must be decided on its own facts.

Murphy, 355 P.2d 323, 325 (Wash 1960).

Here, the record shows that the Petitioner actively participated at his trial, testifying at length and in detail about the events surrounding the murder of Paul Wade. Additionally, Psychiatrist Dr. Edward Quass noted that the doses of Mellaril did not seem to affect the Petitioner. Dr. Quass felt his medicated in-court appearance and unmedicated demeanor were virtually identical. Finally, nothing in the trial transcript suggests that the Defendant's mental capacity was impaired. In fact, there is evidence that it was enhanced.

The Petitioner's reliance on State v. Maryott, 492 P.2d 329 (Wash. 1971), is also misplaced. In Maryott, the defendant was given substantial doses of Sparine, Librium and Chloral Hydrate by his jailers. There was no showing that this medication was ordered by the court either on its



motion or as the result of a hearing. Even at trial, the defendant was noted to be sitting hunched over and staring vacantly ahead. Maryott, supra, at 240.

Absent any showing on the record of an objective reference to the Petitioner's allegedly "drugged state," his assertion of the denial of a fair trial based on mere allegations must fail. Petitioner's assertion that 800 mg of Mellaril would be enough to "tranquilize an elephant" is taken out of context when compared to the testimony of two psychiatrists stating the need for an increased dosage based on the development of a tolerance to the drug over the years, particularly as persons with longstanding drug histories develop higher tolerances for all chemicals.

The prosecutor further established, by two psychiatrists' testimony, that had the Petitioner been taken off his medication he may have become psychotic and required several months of medication to return him to a competent state. One of the psychiatric experts even testified that the Petitioner would be competent if he stayed on the Mellaril medication. AS Nev. Rev. Stat. (NRS) 178.400(1) states: "A person may not be tried, adjudged to punishment or punished for a public offense while he is incompetent." The trial court, far from abusing its discretion in denying the Defendant's

motion, took an affirmative act to ensure the Defendant his constitutional rights.

The Petitioner's reliance on In Re Prey, 336 A.2d 174 (Vt. 1975), is also distinguishable. In that case, the defendant was granted a new trial because the fact that he was under the influence of medication was not revealed to the jury. In the present case, both the fact that the medication was being administered and its effect upon the Defendant were fully imparted to the jury by the testimony of the medical witness.

The Petitioner places reliance on Commonwealth v. Louraine, 453 N.E.2d 437 (Mass. 1983), which stated that the defendant was entitled to be tried in his unmedicated state to facilitate proof of his insanity defense because the trier of fact is entitled to consider the defendant's demeanor in court. Id. at 442.

This case is initially distinguishable because Massachusetts does not adhere to the M'Naghten test utilized in Nevada. See Ford v. State, 717 P.2d 27 (Nev. 1986). The Massachusetts Court utilizes a much broader test which "relieves the defendant of criminal responsibility if, at the time of the conduct, as a result of mental disease or defect, he lacked substantial capacity to conform his conduct

to the requirements of the law." Louraine, supra, at 444, n. 12, citing, Commonwealth v. McHoul, 226 N.E.2d 556 (Mass. 1967). The defendant's demeanor at trial could be deemed to have some relevance under this broader test and the Massachusetts Court specifically adopted the test to permit a wider range of testimony to be received. Id. at 560. However, in Nevada, where the narrower M'Naghten test is the test for insanity, the defendant's demeanor at trial is clearly less probative in determining his sanity at the time of the commission of the crime.

Furthermore, the reasoning utilized by the Massachusetts Court is flawed. A defendant's trial demeanor does not significantly reflect his state of mind at the time of the crime. The issue at trial is whether at the time the crime was committed, the defendant understood and comprehended the difference between right and wrong. Thus, merely because the Petitioner's demeanor might be altered by antipsychotic medication does not preclude him from asserting an effective insanity defense. The most sensible approach is to allow the state to administer proper medication to the defendant to assist in his understanding of the proceedings while at the same time affording the defendant the opportunity to apprise the jury of the effects of the medication. See

"'Mind Control', 'Synthetic Sanity', 'Artificial Competence' and Genuine Confusion: Legally Relevant Effects of Anti-psychotic Medication." 12 Hofstra L. Rev. 77 (1984). This is precisely what the Nevada trial court did in the case at bar.

The Petitioner's heavy reliance on United States v. Charters, 829 F.2d 479 (4th Cir. 1987), is completely inappropriate since this case was reversed in a rehearing en banc, United States v. Charters, 863 F.2d 302 (4th Cir. 1988). Following the rehearing, the Court noted that persons legally confined are not entirely stripped of all constitutionally protected interests. They retain significant interests, but they are not absolute, Id. at 305, citing, Youngberg v. Romeo, 457 U.S. 307, 315, 319-320, 102 S.Ct. 2452, 2457, 2459-2460, 73 L.Ed.2d 28 (1982).

Subsequently, the Court supported a procedure which placed the base line decision to medicate with the appropriate medical personnel of the custodial institution and provided judicial review to guard against arbitrariness. Charters, 863 F.2d at 307-308. A scheme similar to the one articulated in Charters was recently upheld as comporting with due process by this Court and the Fourth Circuit Court of Appeals. Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61

L.Ed.2d 101 (1979); Johnson v. Silvers, 742 F.2d 823 (4th Cir. 1984). Clearly, the scheme presented in the second Charters case parallels the procedures which transpired in the case at bar.

Furthermore, the decision of the Nevada Supreme Court in State v. Riggins, 808 P.2d 535 (Nev. 1991), is squarely in line with the majority of states which have addressed this issue. In Mines v. Florida, 390 S.2d 332 (Fla. 1980), the Supreme Court of Florida in affirming the defendant's conviction for first degree murder held:

The fact that appellant's competency is the result of approved medical treatment and medical science does not invalidate that finding of competency. To hold as suggested by appellant's counsel would mean that an individual with a mental disorder which could be controlled by medical science could not be tried for a criminal offense regardless of his ability to comprehend the nature of the proceedings and to assist counsel in his own defense.

Id. at 335. In Mines, supra, the defendant was diagnosed as schizophrenia of a paranoid type and was recommended treatment with a strong tranquilizing drug.

South Carolina addressed this issue in State v. Law, 244 S.E.2d 302 (S.C. 1978). In that case, the defendant's conviction for murder and the trial court's finding of competency were affirmed on appeal. The defendant was involuntarily

medicated on psychotropic medications including Holdol and Loxatain, and he alleged error because the medication affected his demeanor.

The South Carolina Supreme Court held that:

While it is true the medications do affect cognitive and communicative processes, the effect is beneficial in that it enabled the appellant to effectively exercise the very rights he asserts he was denied. . . . It is our view that medication may be administered without the consent of a defendant under compelling circumstances, including those where the medication is necessary to render a defendant competent to stand trial.

(Emphasis added). Id. at 306-307. This is the situation with the Petitioner in the case at bar. The denial of the Petitioner's motion effectively enabled the Petitioner to exercise the very rights he now asserts he was denied.

As the conviction of an accused while legally incompetent violates due process and must be set aside, Miller v. State, 517 P.2d 182 (Nev. 1973), the trial court in effect, ensured that a violation of the Petitioner's due process rights did not occur by denying the motion. Doubt as to the sanity of a defendant means doubt in the mind of the trial court rather than counsel or others. Williams v. State, 451 P.2d 848 (Nev. 1969).



In his Petition, counsel for Petitioner makes numerous factual assertions which are not correct or are beyond his knowledge. For instance, on page 13 of his Petition he states, "[Riggins] appeared like a zombie to the jury throughout his trial." The trial record does not reflect any such observation. In fact, the testimony of the psychiatrists refutes such a contention.

On page 15, he states, "Defendant RIGGINS was medicated so heavily that he almost appeared comatose." There is no support in the record for such a reckless allegation. Petitioner's present counsel was also trial counsel. It is inconceivable that counsel would proceed with the trial if his client was truly in a zombie-like condition or almost comatose. Further, if those terms reflect Riggins trial demeanor then he would have been incapable of testifying in his own behalf.

On page 20, he states, "DAVID RIGGINS looked apathetic and unemotional to the jurors. Therefore, they discounted testimony that he lacked the capacity at the time of the crime to appreciate the wrongfulness of his conduct." First, the record does not reveal that Petitioner looked apathetic and unemotional. Even if the record did so reflect, given the heinous nature of the murder, such trial demeanor could well be viewed by jurors as supportive of an insanity defense.

From the statement, counsel then leaps to the unreasonable conclusion that the members of the jury discounted Petitioner's testimony that he lacked capacity to know right from wrong at the time of the crime.

The record in this case reveals that Riggins was alert during trial, was able to assist counsel with his defense and testified before the jury.

#### CONCLUSION

In Nevada, a criminal defendant must be found competent before he may proceed to trial. NRS 178.400. If a medicated detainee awaiting trial in this state has an absolute right to appear before a jury in an unmedicated condition, then such a defendant who becomes incompetent when unmedicated could effectively thwart the prosecution of the case by demanding to appear in court unmedicated.

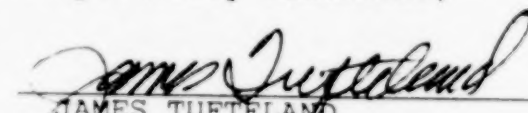
The position adopted by the Nevada Supreme Court in this case was reasonable and not violative of Petitioner's constitutional rights. The trial court allowed extensive testimony regarding Riggins' psychological profile and the effects of Mellaril upon him. The trial court's ruling denying Defendant's Motion to Terminate Medication was not erroneous. The Nevada Supreme Court's decision affirming



the district court's ruling was correct. There is no need for this Court to enunciate a uniform, bright-line rule that fails to take into account differences in state law. The Petition for Writ of Certiorari should be denied.

Dated this 17th day of July, 1991.

Respectfully submitted,

  
JAMES TUFTELAND  
Chief Deputy  
Attorney for Respondent  
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District Attorney  
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No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

\* \* \* \* \*

DAVID E. RIGGINS, )  
Petitioner/Appellant, )  
v. )  
STATE OF NEVADA, ) Nevada Supreme Court  
Respondents ) No. 19873

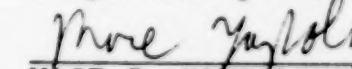
MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

The Petitioner, DAVID E. RIGGINS asks leave to file the attached Petition for Writ of Certiorari without prepayment of costs and to proceed in forma pauperis. Petitioner has previously been determined to be indigent and has been represented by appointed counsel in the Nevada Supreme Court.

Petitioner's affidavit in support of this motion is attached hereto.

DATED this 24 day of JUNE, 1991.

Respectfully Submitted,

  
MACE J. YAMPOLSKY, ESQ.  
520 South Fourth Street  
Las Vegas, Nevada 89101  
(702) 384-5563

Attorney for Petitioner

RECEIVED

JUN 26 1991

OFFICE OF THE CLERK  
SUPREME COURT

Supreme Court U.S.  
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6-13-91  
JOSEPH F. SPANGLER JR.  
CLERK

9

CERTIFICATE OF MAILING

I hereby certify and affirm that I mailed a copy of the foregoing BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA to the attorney of record listed below on this 17th day of July, 1991.

MACE J. YAMPOLSKY, ESQUIRE  
Attorney at Law  
520 South Fourth Street  
Las Vegas, Nevada 89101

*[Signature]*  
Employee, Clark County  
District Attorney's Office

LAW OFFICE OF  
MACE J. YAMPOLSKY  
ATTORNEY AT LAW  
520 SOUTH 4TH STREET  
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(702) 384-5563

No. \_\_\_\_\_

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1990

\* \* \* \* \*

**RECEIVED**

**JUN 25 1991**

OFFICE OF THE CLERK  
SUPREME COURT, U.S.

DAVID E. RIGGINS,  
Petitioner/Appellant

v.

STATE OF NEVADA,  
Respondent

)  
)  
)  
) Nevada Supreme Court  
) No. 19873  
)

Affidavit in Support of Motion to Proceed  
on Appeal in Forma Pauperis

I, DAVID E. RIGGINS being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of My Motion to Proceed in this Court without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress; and that the issues which I desire to present in the Petition for Writ of Certiorari are valid.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the appeal are true.

1. Are you presently employed? A) If the answer is yes, state the amount of your salary or wages per month and

*[Handwritten mark]*

1 give the name and address of your employer. B) If the answer  
2 is no, state the date of your last employment and the amount  
3 of the salary and wages per month which you received.

4 N/A  
5  
6  
7

8 2. Have you received within the past twelve months any  
9 income from a business, profession or other form of self-  
10 employment, or in the form of rent payments, interest,  
11 dividends, or other source? A) If the answer is yes, describe  
12 each source of income, and state the amount received from each  
13 during the past twelve months.

14 N/A  
15  
16  
17

18 3. Do you own any cash or checking or savings accounts?  
19 (If the answer is yes, state the total value of the items  
20 owned).

21 N/A  
22  
23  
24

25 4. Do you own any real estate, stocks, bonds, notes,  
26 automobiles or other valuable property (excluding ordinary  
27 household furnishings and clothing)? If the answer is yes,  
28

1 describe the property and state its approximate value.  
2  
3  
4  
5  
6

7 N/A  
8  
9  
10  
11

12 5. List the persons who are dependent upon you for  
13 support and state your relationship to those persons.

14 N/A  
15  
16  
17

18 Dated: June 19, 1991

19 By: David E. Riggins

20 VERIFICATION

21 Pursuant to NRS 15.010, under penalties of perjury, the  
22 undersigned declares that he is the petitioner, named in the  
23 foregoing Affidavit and knows the contents thereof; that the  
24 Affidavit is true of his own knowledge, except as to those  
25 matters stated on information and belief, and that as to such  
26 matters, he believes it to be true.

27 David E. Riggins  
28 DAVID E. RIGGINS

SUBSCRIBED AND SWORN to before me  
this 19th day of June, 1991.

Zoetta J. Waggener  
NOTARY PUBLIC in and for said  
County and State.

